

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 February 2004

BALCA Case No.: 2003-INA-25
ETA Case No.: P2001-NJ-02475436

In the Matter of:

KELLY'S TAVERN, INC.,
Employer,

on behalf of

VICENTE VALENCIA-ORTIZ,
Alien.

Certifying Officer: Dolores DeHaan
New York, NY

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Kelly's Tavern, Inc. ("Employer") on behalf of Vicente Valencia-Ortiz ("the Alien") for the position of Cook, Specialty, Foreign Food. (AF 56).² The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF"). 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

²"AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On October 29, 1999, Employer filed an application for alien labor certification on behalf of the Alien to fill the position of Foreign Food Specialty Cook. The minimum requirement for the position was listed as one year experience in the job offered. (AF 56).

The CO issued a Notice of Findings (“NOF”) on July 9, 2002, proposing to deny certification. (AF 47-49). Noting that the restaurant menu does not show any Spanish or Mexican dishes other than nachos, the CO questioned the existence of a permanent bona fide full-time position for a Foreign Food Specialty Cook. In order to rebut the finding, Employer was instructed to document that there was a bona fide job opportunity by including menus, resumes of former cooks and any other relevant information.

In Rebuttal, Employer submitted a hand-printed list of Mexican dishes described as “Blackboard Specials” and identified a worker who Employer stated has been employed for the past eighteen years as a Cook in charge of the Spanish and Mexican dishes. Employer further stated that the demand for Spanish and Mexican food has grown over the past six years to the point where this worker had difficulty keeping up with the demand. (AF 50-56).

On September 10, 2002, the CO issued a Final Determination (“FD”) denying labor certification based upon a finding that Employer had failed to demonstrate that a bona fide, permanent full-time position existed in his business for a Foreign Food Specialty Cook. (AF 57-58). Employer’s failure to produce any resumes of incumbents or former incumbents or any documentation of their employment in the position, as well as inadequate menu documentation was cited as the basis for the denial. (AF 57).

Employer filed a Request for Review by letter dated October 4, 2002 and the matter was docketed in this Office on November 19, 2002. (AF 59-78). Along with its

Request for Review, Employer submitted a copy of its menu and copies of several resumes from former incumbents.

DISCUSSION

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988). The denial of certification is not appropriate, however, if the CO requests documentation which is difficult to obtain and the employer submits other evidence sufficient to rebut the CO's challenge. *Engineering Measurement Co.*, 1990-INA-171 (Mar. 29, 1991).

In the instant case, Employer failed to adequately address the issues raised by the CO in the NOF. The CO was specific both as to the bases for her findings and the necessary documentation required to rebut those findings. The requested documentation, menus and resumes of former incumbents, should have been easily obtainable, yet Employer chose not to submit such documentation until after the FD was issued. At the time of rebuttal, Employer submitted only a hand-written copy of "Blackboard Specials" and a statement regarding his cook of the past eighteen years. With the request for review, Employer submitted a copy of the menu, as well as applications of former cooks with handwritten notations regarding their performance and reasons for leaving the position. (AF 59-63, 66-70). The fact that Employer belatedly submitted the requested documentation with no explanation as to why it was not submitted prior to the issuance of the FD establishes that it was reasonably available at the time of rebuttal. However, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 1990-INA-191 (May 20, 1991). The employer has the burden of proof to submit the requested

documentation at the time of the rebuttal. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Employer has failed to demonstrate the existence of a bona fide job opportunity. Based upon the foregoing, we conclude that Employer's request for labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.